SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 318

LOUISE McGREW MOFFETT AND LOUISE McGREW MOFFETT AS EXECUTRIX OF THE ESTATE OF THOMAS S. MOFFETT, DECEASED,

Appellants,

vs.

COMMERCE TRUST COMPANY, A CORPORATION; HELEN WEEDE, B. C. HOWARD AND WILLIAM H. KOPP,

Appellees

MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY.

Come now the above Appellees, not intending hereby to waive or abandon in any manner their motion to dismiss or affirm the judgment of the Supreme Court of Missouri, as set forth in "Appellees' Suggestions Opposing Jurisdiction, and Motion to Dismiss Appeal or Affirm Judgment"

filed in this cause, and not intending hereby to prejudice the hearing and disposal of said motion, hereby respectfully moves the Court to strike all, or the hereinafter particularly designated portions of "Appellants' Statement and Designation under paragraph 9, Rule 13" of the points on which they intend to rely, and for a designation of the matter sought to be stricken, and for grounds of this motion, Appellees state:

1. The entire purported designation of the points on which Appellants intend to rely is vague and general, being a designation and adoption of the 37 assignments of error filed in the court below, plus two additional assignments which Appellants belatedly attempt to make in this Court; which procedure confuses the issues to be presented and defeats the purpose of the applicable rules of this Court, which is to require a clear and concise statement of the points relied upon such as will enable the Court, as well as opposing counsel, readily to perceive such points.

2. That part of said designation entitled "Assignment of Errors" (subdivided as parts I and II) should be stricken for the reason that said assignments were not filed with the Clerk of the Supreme Court of Missouri, at the time of filing of, and accompanying Appellants' petition for appeal as required by rule 9 of this Court, but such designation constitutes an attempt to add additional assignments of error after the time provided by said rule and in violation thereof.

3. The first paragraph of said designation, attempting to adopt by reference Appellants' assignment of errors, 37 in number, theretofore filed in the Supreme Court of Missouri

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under the provisions of rule 9 of this Court, should be stricken, for the reason that the number of said assignments, with the two sought to be added in the Appellants' designation, is so great that they point out nothing specific and do not constitute a clear and concise statement of material points on which Appellants intend to rely as contemplated by the rules of this Court, and if such purported points are permitted to stand there will thereby be imposed upon the Court, and upon counsel for Appellees, the burden of attempting to construe the vague and numerous assignments in violation of the purposes of the rule to place upon Appellants the duty to make so clear and concise a designation that the Court, as well as Appellees' counsel, may readily perceive what points are relied upon.

4. The entire statement of points intended to be relied upon should be stricken for the further reason that the numerous assignments of error sought to be incorporated by reference as points to be relied upon, raise many questions, some of which are *prima facie* non-Federal and as to the remainder, any substantial Federal character is denied by Appellees. The attempted designation of points as made, does not clearly and fairly apprise the Court and counsel for Appellees, of the questions which Appellants actually intend to brief and argue before this Court.

WHEREFORE, the premises considered, Appellees move the Court to strike from the records of this Court the purported designation by Appellants of the points upon which they intend to rely filed by Appellants in this Court on the — day of July, 1946, and to make and enter in this cause such orders as may be appropriate under the rules and practice of this Court for the violation of its rules regarding definite

statements of the points on which the Appellants intend to rely.

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Appellee.

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Appellees

SUGGESTIONS IN SUPPORT OF "MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY."

Come now Appellees and offer the following brief suggestions and authorities in support of their motion to strike all or certain portions of Appellants' designation of points to be relied upon.

Appellants filed in the Supreme Court of Missouri their Assignment of Errors, 37 in number. In the foreword to

Appellees' suggestions opposing jurisdiction, we complained of the generality and misleading effect of these numerous assignments of error. Appellants in their designation of points to be relied upon have attempted to incorporate by reference all of said 37 assignments; and to add thereto two additional assignments, after the time provided by the rules and in violation thereof. Instead of restricting the issues, as we think is clearly contemplated by the rules of this Court, Appellants have attempted to enlarge them in their designation of points to be relied upon.

We believe the observation of the Court in *Shepard* v. *U. S.*, 85 C. C. A., 160 Fed. 584, 592, pertinent here, wherein the Court said that, generally speaking:

> "Such interminable assignments, instead of impressing the court with the thought of an imperfect trial, rather cast discredit upon the worth of any of them."

The foregoing is quoted with approval in the case of *Chicago, Gt. West. Ry. Co.* v. *McDonough*, 161 Fed. 657, 659, which latter opinion was cited as authority by this Court in *Central Vermont Ry. Co.* v. *White, Administratrix*, 238 U. S. 507.

The original 37 assignments of error and the two sought to be raised out of time are so vague, general and indefinite as not to enable the Court or counsel to perceive readily the exact points intended to be relied upon. Many of the assignments clearly do not involve any Federal question and Appellees deny that there is here involved any Federal question sufficiently substantial to invoke the jurisdiction of this Court.

We believe the violation of the rules of the Court is so flagrant that this Court would, of its own motion, note the infraction and take appropriate action in regard thereto.

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However, counsel for appellees deem it their duty to the Court and to their clients, to call this matter to the attention of the Court.

In a similar situation this Court expressed itself in *Local 167 I. B. T. etc.* v. *U. S.*, 291 U. S. 293, 296, 78 L. Ed. 804, 808, as follows:

> "*In view of the omission of appellee to object* and the *lack of precedent definitely in point* we refrain from dismissing the appeal for failure substantially to comply with the statute and our rule in respect of assignment of errors. U. S. C. title 28, #862, Rule 9. But what is here said is to be understood as an announcement that *in the future a failure of that sort may be taken as sufficient ground for dismissal.*" (Emphasis added.)

We have therefore taken care to call the attention of the Court to the fact that in this case there is neither want of objection nor lack of authority for even the dismissal of the appeal. In discussing the assignment of errors in the last cited case this Court said, 291 U. S. l. c. 296, 78 L. Ed. 808:

> "While it is possible to find among them basis for the five points indicated, they contain so much that is irrelevant that they tend to confuse rather than to define the issues to be presented. They do not appropriately serve the convenience of the appellee or of the court."

We believe the above language of this Court particularly pertinent to the numerous assignments here, especially in view of the fact that Appellants are seeking to use their assignment of errors as points upon which they intend to rely.

We have found no case in which this Court has condemned the practice of designating the points to be relied upon by reference to assignments of error if the assignments so

designated as points, define the issues to be presented, and do not tend to confuse or obscure them. It is the failure of Appellants to condense and define the precise points upon which they intend to rely, which is the first basis of this motion. But the Circuit Court of Appeals, 9th Circuit, in *Peck* v. *Shell Oil Co.*, 142 F. (2d) 141, held that the attempt to supply the specifications of error required by the rules of the court, by reference to a statement of points on appeal, was in itself a violation of the rules, which are quite similar to the rule of this Court on the designation of points upon which Appellants intend to rely. The Court there said (142 F. (2) l. c. 143):

> "It should be noted at the outset that appellants have completely failed to comply with the rule 20(d) of the rules of this court in that no numbered specifications of error are included in their brief. They merely refer to a page in the printed transcript where their statement of points on appeal (filed in accordance with our rule 19) appears. Such a reference does not satisfy rule 20(d)."

In addition, in this case the designation of points is by reference to assignments of error previously made, such reference being in the designation which at the same time attempts to add further assignments of error made out of time and otherwise in violation of the rules of this Court. The designation is an attempt to piece together two separate documents and to deprive the court and opposing counsel of the clear and concise statement, in one place, of the exact points to be relied upon, to which we conceive they are entitled under the rules of this Court.

The rule of this Court here in question calling for "a definite statement of the points on which he (appellant) intends to rely" has been construed by this Court to call for "a clear and concise statement of material points on which

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plaintiff in error intends to rely." *Central Vermont Ry. Co.* v. *White*, 238 U. S. l. c. 509, 59 L. Ed. l. c. 1435.

We call attention to the following additional authorities which we believe sustain the criticism of Appellants' designation of points on which they intend to rely:

Chesapeake & D. Canal Co. v. *United States of America*, 250 U. S. 123, 124, 63 L. Ed. 889, 891;

The Phillips & Colby Construction Co. v. *Seymour*, 91 U. S. 646, 23 L. Ed. 341, 342.

We respectfully ask the Court to take such action as may be proper under the rules of the Court, in accordance with the prayer of the accompanying motion.

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